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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN COLBERT,

Defendant and Appellant.

B148254

(Super. Ct. No. BA200404)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Marsha N. Revel, Judge. Affirmed.

Linn Davis, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Pamela C. Hamanaka, Senior Assistant Attorney General, Kenneth C. Byrne,
Supervising Deputy Attorney General, and Zee Rodriguez, Deputy Attorney General, for
Plaintiff and Respondent.

John Colbert appeals the judgment entered after conviction by jury of driving a vehicle without the owner's consent, possession of a controlled substance, possession of a smoking device, a misdemeanor, and receiving stolen property. (Veh. Code, § 10851, subd. (a); Health & Saf. Code, §§ 11350, subd. (a), 11364; Pen. Code, § 496, subd. (a).) ¹ The jury found Colbert had five prior convictions within the meaning of the Three Strikes law and had served five prior prison terms within the meaning of section 667.5, subdivision (b). The trial court sentenced Colbert to a term of 25 years to life in state prison. Colbert contends the case must be remanded for reconsideration under the new Three Strikes policy of Los Angeles District Attorney Steve Cooley and the term imposed constitutes cruel and unusual punishment. We reject these contentions and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Prosecution's evidence.

Viewed in accordance with the usual rule of appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11), the evidence established that on March 18, 2000, Tiefa Smith parked her 1996 Volkswagen Golf in a carport at 74th Street and Crenshaw Boulevard, locked the vehicle and left a key in the ash tray. When Smith returned on March 20, 2000, the Golf was gone. Smith had not given Colbert permission to drive the Golf.

¹ Subsequent unspecified statutory references are to the Penal Code.

On March 20, 2000, at approximately 10:30 p.m., Los Angeles Police Officer Matthew Cundiff saw Colbert driving a Golf west on 61st Street near Figueroa Street without any headlights. Cundiff received information the Golf had been reported stolen and requested assistance. When other officers arrived, Cundiff stopped the Golf at 51st and Hoover Streets and detained Colbert. Cundiff patted Colbert for weapons and found a glass pipe and a plastic bindle containing 0.05 grams of a substance containing cocaine. Colbert voluntarily stated the substance was “bunk and . . . soap.” Cundiff testified such an amount of cocaine would sell for \$5 and would be sufficient to produce a narcotic effect.

At approximately 11:00 p.m. that evening, Colbert waived his rights per *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694], and told Los Angeles Police Officer Christopher Allen he obtained the Golf from an individual in the area of 71st Street and 11th Avenue at 2:00 p.m. that day. Colbert purchased rock cocaine from the individual and was promised additional cocaine if Colbert would drive the Golf to Western and Vermont Avenues and give a female a ride. Colbert forgot the address and formed the opinion the cocaine he had purchased from the individual was “bunk or no good.” When Allen asked whether Colbert knew the Golf was stolen, Colbert indicated that, considering the individual from whom he had received the Golf, Colbert “probably figured it was stolen.” Colbert said he liked the Golf and had decided to keep it.

Los Angeles Police Detective Richard Jackson interviewed Colbert the next day. Colbert again waived his *Miranda* rights and told Jackson that on March 20, 2000, at

approximately 2:00 p.m., he purchased drugs from an individual named James. After Colbert ingested the drugs, he returned to purchase more. James then asked Colbert to drive the Golf, which was parked a few blocks away, to Vermont and Western Avenues and, in exchange, James would give Colbert a quantity of drugs. James gave Colbert a package and Colbert tried to smoke what James had given him but found it was soap. When Colbert saw police officers approach, he pulled over. Colbert claimed he “had no idea” the Golf was stolen.

A paralegal testified regarding the significance of the information contained in Colbert’s section 969b prison packets. A fingerprint expert matched Colbert’s fingerprints to those found in the prison packets.

2. Defense evidence.

Gary Sasser, aka Hakim Mohammed, a twice convicted robber, testified he “very vaguely” remembers having a conversation with Colbert on Florence Avenue around March 20, 2000. Shortly thereafter, Sasser saw another individual hand Colbert a set of keys.

Colbert testified in his own behalf. Colbert admitted prior convictions of grand theft in 1981, two counts of assault with intent to commit rape in 1983, two counts of robbery in 1987, receiving stolen property in 1991, and first degree burglary in 1993. On March 20, 2000, James, an individual from whom Colbert had purchased cocaine earlier in the day, asked Colbert to pick up James’ girlfriend in what James described as his car. James gave Colbert car keys, told Colbert where the car was parked and

promised to give Colbert cocaine when Colbert returned. Colbert took the keys, purchased additional cocaine from James and went to a nearby apartment to consume it.

As Colbert left the apartment, he saw James and told him he had not yet departed. James said the female would not be ready until 10:00 p.m. and gave Colbert a ziploc baggie containing what Colbert believed was \$20 worth of rock cocaine. Colbert went to the Golf, started it with the key and drove to his home where he attempted to smoke the substance James had given him. However, it melted into a paste which caused Colbert to believe it was either soap or procaine, a substance used to dilute cocaine. Colbert was stopped by the police on his way to get the female. Colbert admitted he told Officer Cundiff the substance in the baggie was “bunk” but denied he said he assumed the Golf was stolen because it had been given to him by a drug dealer. Colbert also denied telling Officer Allen he had forgotten the female’s address or that he had decided to keep the Golf.

3. The jury’s verdicts and findings.

The jury found Colbert guilty of the charged offenses and found he had five prior convictions within the meaning of the Three Strikes law and that he had served five prior prison terms.

4. Sentencing considerations.

Before trial, on December 13, 2000, defense counsel asked the trial court to strike four of Colbert’s five prior serious felony conviction allegations because Steve Cooley had been elected District Attorney based on his campaign promise not to seek third strike

sentences for non-serious felonies. The trial court reviewed Colbert's criminal history and denied the request.

Prior to Colbert's sentencing, on December 9, 2000, District Attorney Cooley issued a new Three Strikes policy. Pursuant to the new policy, a case in which none of the charged offenses is a serious or violent felony would be presumed to be a second strike case. However, the new policy also provided: "This presumption may be rebutted. The Head Deputy may decline to seek dismissal of a strike if the current offense involves the use or possession of a firearm or deadly weapon, injury to a victim, violence or the threat of violence. [¶] If in the judgment of the Head Deputy, factors other than those enumerated above warrant a Third Strike sentence, that recommendation supported by a written memorandum should be referred to the appropriate Bureau Director for final decision. The memorandum should include an evaluation of the final decision. The memorandum should include an evaluation of the seriousness of the current crime, the facts underlying the prior convictions and the defendant's character, background and any other aggravating and mitigating factors set forth in the California Rules of Court, Rules 421 and 423." (Special Directive 00-02.) ²

² The People opposed Colbert's motion to take judicial notice of District Attorney Cooley's new policy because the news release was not a proper subject for judicial notice. This court denied Colbert's request for judicial notice of the new policy on May 23, 2001. Upon further consideration, we grant Colbert's request and take judicial notice of the new policy. (See *People v. Roman* (2001) 92 Cal.App.4th 141, 145, fn. 5.)

At sentencing, defense counsel argued Colbert's current offenses were non-violent and Colbert had been cooperative with the police officers who arrested him. In support of his request to strike the prior convictions, Colbert presented numerous letters which indicated Colbert had counseled other inmates and had been helpful in "defus[ing] disturbances and racial tensions in the jail." Defense counsel claimed 46-year-old Colbert had shown willingness to rehabilitate and a third strike term would be tantamount to life in state prison.

In response to defense counsel's argument that Colbert's prior convictions were remote in time, the trial court pointed out Colbert had been imprisoned in 1993 for a 14-year term and had only recently been released on January 19, 2000. The trial court then reviewed Colbert's history of criminal activity and concluded that "since 1983, [Colbert] has been convicted of felonies or in prison almost the whole time, and he" only had been released from prison two months before he committed the instant offense. The trial court conceded the current offenses were nonviolent but noted the prior convictions "were all very serious."

With defense counsel's permission, the trial court reviewed the reports of the probation officer prepared in connection with the prior convictions and noted one prior conviction of assault with intent to commit rape had involved a 17-year-old victim who forcibly had been taken to a car and threatened with death. In the second conviction, Colbert forcibly raped a different 17-year-old victim. Colbert struck the victim in the face and told her he would kill her if she did not "shut up." The trial court indicated

Colbert had five prior serious felony convictions, “not just two, and I think the facts and circumstances of the felonies are very important, . . . and [Colbert] was never out [of prison] for long.” “I think even under Steve Cooley’s new policy, I think they would look at the nature and circumstances of the prior[convictions] leading up to the nonviolent felony.”

The prosecutor indicated familiarity with the new policy and stated: “Mr. Cooley never said that all third-strike, nonviolent charges would be treated as nonthird strikes. He has indicated it would be based on the background of the felonies, taking into account that the current offense is not a serious or violent felony.” The prosecutor conceded a third strike term is harsh, “but no more so than [Colbert] deserves for a lifetime of criminal activity.”

After hearing further argument, the trial court concluded it would constitute an abuse of discretion to strike four prior serious felony convictions in this case. The trial court reached this conclusion based on the aggravated nature of the prior convictions and the fact Colbert had only been released from prison two months prior to the commission of the current offense. The trial court imposed all subordinate terms concurrently in light of the nature of the current offenses and the fact Colbert had shown signs of rehabilitation while in custody.

CONTENTIONS

Colbert contends the case must be remanded for reconsideration under the new Three Strikes policy of Los Angeles District Attorney Cooley and the term imposed constitutes cruel and unusual punishment.

DISCUSSION

1. There is no need to remand this case for further consideration.

Colbert contends he was denied due process and equal protection of the laws because District Attorney Cooley's new policy was not applied to him even though it was in effect at the time of his sentencing on February 9, 2001. Colbert argues he presumptively was "entitled" to be treated as a second strike offender under the new policy because none of his current charges was a serious or violent felony. Colbert claims the prosecutor and the trial court either were not familiar with the new policy or misunderstood it and there is no evidence the Head Deputy prepared a written memorandum indicating why the presumption should be rebutted in this case. Colbert claims the deputy district attorney assigned to this case substituted his own views for those stated in the new policy and claims fundamental fairness requires this case be remanded for resentencing as a second strike offender.

We disagree. The prosecutor's stated understanding of the new policy was consistent with District Attorney Cooley's new policy. Indeed, at the sentencing hearing, the prosecutor indicated awareness of the new policy and of his discretion to treat Colbert

as a second strike offender in this case. However, because of the seriousness of the prior convictions, the prosecutor had decided to seek a third strike term. This construction of the new policy by the prosecutor is fully consistent with the written policy set forth above. Thus, Colbert fails to demonstrate he would be charged as a second strike offender upon remand.

Further, based on the trial court's statements at the time of sentencing, it is clear it would not have struck four of Colbert's prior serious felony convictions in order to impose a second strike term regardless of District Attorney Cooley's policy. Indeed, orders striking prior serious felony convictions in order to sentence a "revolving door defendant" such as Colbert to a second strike term have been disapproved as an abuse of discretion. (*People v. Gaston* (1999) 74 Cal.App.4th 310, 320; *People v. Thornton* (1999) 73 Cal.App.4th 42, 48-49; *People v. Humphrey* (1997) 58 Cal.App.4th 809, 813; *People v. McGlothlin* (1998) 67 Cal.App.4th 468, 475-477; *People v. DeGuzman* (1996) 49 Cal.App.4th 1049, 1054-1055.)

In sum, District Attorney Cooley's new policy effected no change in the Three Strikes law, Colbert properly was sentenced under that law and he has failed to show any different result would obtain upon remand. (See *People v. Roman, supra*, 92 Cal.App.4th at pp. 146-149 [the doctrine of abatement does not apply to defendants sentenced prior to issuance of District Attorney Cooley's new policy].) For all these reasons, we deny Colbert's request for remand.

2. *The term imposed does not constitute cruel and unusual punishment.*

Colbert contends the term imposed for driving a vehicle without the owner's consent, receiving stolen property and possession of 0.05 grams of cocaine is disproportionate to his individual culpability, the crimes for which it is imposed, and it is excessive when compared to the punishment imposed for more serious offenses in this jurisdiction and when compared to the punishment imposed for the same offense in other jurisdictions. (*In re Lynch* (1972) 8 Cal.3d 410; *People v. Dillon* (1983) 34 Cal.3d 441; see *Durden v. California* (2001) ___ U.S. ___ [148 L.Ed. 2d 1027]; *Riggs v. California* (1999) 525 U.S. 1114 [142 L.Ed.2d 789].)

Colbert asserts the Golf was returned to its owner undamaged 10 hours after it was stolen, he possessed an insignificant amount of cocaine, the conviction of receiving stolen property was based on possession of the Golf and Colbert voluntarily pulled to the curb and exited the Golf when the police officers began to follow him. Colbert asserts a third strike term for a non-serious felony involving no injury to any person shocks the conscience. Colbert claims no other state in the union would punish him as harshly for the current convictions and claims he has preserved the cruel and unusual punishment issue for appeal because he asked the trial court to strike the prior convictions in the interests of justice.³

³ In order to forestall a later claim of ineffectiveness of trial counsel, we address the merits of Colbert's cruel and unusual punishment contention and thus need not decide whether the issue was waived for failure to object on that specific ground below. (See *People v. Beltran* (2000) 82 Cal.App.4th 693, 697-698, fn. 5; *People v. Cortex* (1999) 73 Cal.App.4th 276, 286, fn. 10; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.)

The longer prison sentences required by the Three Strikes law, by the very terms of that law, are triggered upon conviction of any felony as long as the defendant has sustained the requisite prior serious or violent felony convictions. (*People v. Strong* (2001) 87 Cal.App.4th 328, 344.) Because the express intent of the Three Strikes law is “to ensure longer prison sentences” for any defendant who has a qualifying strike and subsequently commits “a felony,” the nonviolent or nonthreatening nature of the current felony cannot alone take the crime outside the spirit of the law. (*Ibid.*) To conclude otherwise would rewrite the statute to impose a longer prison sentence only on those defendants who commit a violent or threatening felony after having committed at least one strike. (*Ibid.*) Thus, there is no requirement the current conviction be a serious or violent felony in order to avoid the claim a third strike term is cruel and unusual. (*Ibid.*; *People v. Cooper* (1996) 43 Cal.App.4th 815, 825.)

Here, Colbert is being punished not only for the current offense but also for his recidivism. (*People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630-1631; *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511-1512.) Also, as previously noted, Colbert’s long history of recidivism reveals him to be “the kind of ‘revolving door’ career criminal for whom the Three Strikes law was devised.” (*People v. Gaston, supra*, 74 Cal.App.4th at p. 320.)

Regarding Colbert’s claim the term imposed is greater than would have been imposed in any other state, this does not render the sentence cruel and unusual. Otherwise, California would have to conform its penal sanctions to penalties imposed in

other states and “could never take the toughest stance against repeat offenders [¶] . . . ‘Whether a particular punishment is disproportionate to the offense is a question of degree. The choice of fitting and proper penalty is not an exact science but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will. In some cases, leeway for experimentation may be permissible. Thus, the judiciary should not interfere in the process unless a statute prescribes a penalty “ ‘out of all proportion to the offense.’ ” ’ [Citations.]” (*People v. Martinez, supra*, 71 Cal.App.4th at p. 1516; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 18.)

In sum, upon review of all the evidence, we conclude Colbert’s lengthy criminal record, which has continued virtually unabated throughout Colbert’s entire adult life, brings Colbert squarely within both the letter and spirit of the Three Strikes law. In light of Colbert’s individual circumstances, criminal history and his total failure to rehabilitate despite repeated opportunities to do so, the term imposed is not grossly disproportionate to the current offense and does not constitute cruel and unusual punishment in violation of the Eighth Amendment. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 965 [115 L.Ed.2d 836]; *Rummel v. Estelle* (1980) 445 U.S. 263, 284-285 [63 L.Ed.2d 382].)

Nor is the punishment “so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch, supra*, 8 Cal.3d at p. 424; *People v. Dillon, supra*, 34 Cal.3d at pp. 477-478; see *People v. Murphy* (2001) 88 Cal.App.4th 392, 394 [upholding third strike term for

petty theft where the accused had three prior convictions of burglary]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1337-1338 [upholding third strike term for grand theft and commercial burglary]; *People v. Goodwin* (1997) 59 Cal.App.4th 1084, 1093-1094 [upholding third strike term for petty theft of a pair of pants]; *People v. Kinsey, supra*, 40 Cal.App.4th at pp. 1630-1631; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1193-1200; but see *People v. Cluff* (2001) 87 Cal.App.4th 991, 1001-1004 [strongly suggesting that a third strike term for a “technical” violation of section 290 (failure to register as a sex offender) committed without intent to deceive or evade law enforcement would constitute cruel and unusual punishment], see also *Andrade v. California Attorney General* (9th Cir. 2001) 270 F.3d 743 [term of 50 years to life in state prison for two counts of petty theft with a prior theft related conviction constitutes cruel and unusual punishment where the heroin addicted defendant had no prior violent felony convictions].)

DISPOSITION

The judgment is affirmed.

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KLEIN, P.J.

We concur:

CROSKEY, J.

KITCHING, J.